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ABSTRACT

The First Amendment free speech right is one of the most frequently asserted constitutional challenges to dismissal or discipline of a school district employee. In any employee's claim of violation of free speech right by a public employer, a threefold process of review should be made: (1) Was the conduct in question constitutionally protected in that it affected matters of legitimate public concern? (2) If so, was the school district's action in response to the conduct justified in light of the district's interest in the efficiency, integrity, and discipline of its operation? (3) Was the school district's action motivated by the employee's protected conduct or were there other, constitutionally neutral factors that would have caused the action in the absence of the protected conduct? The recent Supreme Court decision in "Connick vs. Myers," by establishing that First Amendment protection extends only to matters of public concern, provides the basis for summary dismissal of attempts by employees to constitutionalize private disputes. (TE)

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First Amendment Claims By Public Employees

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Together with the due process and equal protection of the laws guarantees, the first amendment free speech right is probably the most frequently asserted constitutional challenge to the dismissal or discipline of a school district employee. Such a claim typically arises with an employee allegation that his or her termination, for example, was motivated by a statement he or she made, orally or in print, with which the board of education or a supervisory administrator disagreed.

In recent years, the United States Supreme Court has established a format of shifting burdens of proof to be used in analyzing these claims. This involves an initial showing by the teacher that his or her conduct was a "substantial" or "motivating" factor in the termination decision. The board of education may then rebut this showing by establishing, by a preponderance of the evidence, that it would have reached the same decision even in the absence of this conduct.[1] In short, for the teacher to prevail, the evidence must show that he or she would have been rehired *but for* the constitutionally protected conduct.[2]

There is, however, a threshold issue preceding the *Mount Healthy* analysis: did the teacher engage in conduct which is entitled to constitutional protection at all? In its last term, the Supreme Court addressed this question in *Connick v. Myers*.[3]

Connick is a successor to the Court's opinion in *Pickering v. Board of Education*,[4] wherein the Court set out the basic framework of competing legal interests involved in these cases. On the one hand, public employees may not be compelled, as a condition of employment, to surrender the first amendment rights enjoyed by all citizens to comment on matters of public interest. However, the state, as employer, has significantly greater interests in regulating the speech of its employees than that of the citizenry at large.

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* *See* Chapter 2 for biography.

1. Mount Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977).
2. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 417 (1979).
3. 103 S. Ct. 1684 (1983).
4. 391 U.S. 563 (1968).

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[5]

The teacher in *Pickering* had publicly commented on a school district financial controversy which was clearly a "matter of legitimate public concern" to the electorate.[6] Similarly, in *Givhan*, which held that a private expression of opinion was protected, the subject matter, racially discriminatory school policies, was of public concern.

However, until *Connick*, the line between protected conduct and conduct which was essentially beneath the dignity of federal law, or, in fact, whether any speech short of libel or obscenity fell in the latter category, had not been analyzed by the Supreme Court in this context. The Court concluded that although all expression, again except the very narrow class including obscenity, was within the ambit of the first amendment, the protection accorded employee expression on matters of legitimate public concern was subject to limitation.[7]

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.
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> . . .
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> We hold . . . that *when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest*, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. Our responsibility is to insure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the state. [emphasis added][8]

By this holding, the Supreme Court has required that before any balancing of interests and before application of the *Mt. Healthy*

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5. *Id.* at 568.
6. *Id.* at 571-72.
7. *Id.* at 720.
8. *Id.* at 719, 720.

analysis, the teacher must show that the conduct involved was protected, *i.e.*, that it related to a matter of "political, social, or other concern to the community." Importantly, this determination is a question of law to be decided by the trial court, not a jury, and, as such, is not binding on an appellate court.[9] It may further be noted that the *Pickering* balancing test, if the public concern question has been resolved in favor of the teacher, is probably also a legal question addressed to the Court.[10]

The "public concern" question directed to the Court is to be determined from the "content, form and context of a given statement, as revealed by the whole record."[11] The *Connick* opinion on this issue is limited to the facts of the case and, therefore, not comprehensive; it makes clear that not every occurrence within a governmental office nor every criticism of a public official is a public concern.[12]

The employee there was dismissed for circulating a questionnaire among the other employees relating to their confidence in their superior and office morale. The Court concluded that, with one exception, the questions were merely an attempt by an employee to "gather ammunition" in her continuing controversy with her superiors.[13] The employee's conduct was not intended to inform the public of wrongdoing within a public office or to disseminate information relevant to the performance of an elected official. Basically, what was involved was a private dispute between an employee and her superior, and her conduct in that form and context was not actionable.

Every claim will, of course, present a unique set of facts and circumstances. General analytic guidelines can be derived from opinions concerning the fundamental role of the free speech guarantee in the American constitutional democracy. Thus, expressions of fact or opinion on matters of political and social consequence will most certainly fall within the protection of the first amendment.[14]

However, just as plainly, mere interpersonal disputes, even if related to the operation of a public body, should not be sufficient to raise a federal claim. For example, the teacher who becomes embroiled with his principal over a classroom assignment, resulting in an argument or exchange of combative memoranda, may not immunize himself from disciplinary response with the shield of the free speech right. In such a case, *Connick* gives the school district a summary basis to dispense with employee litigation.

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9. Connick, *supra* note 3 at 720 n.7; Mt. Healthy, *supra* note 1.
10. Connick, *supra* note 3 at 722 n.10.
11. *Id.* at 720.
12. *Id.* at 721.
13. *Id.*
14. New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1976).

Decisions preceding *Connick* in the lower courts sometimes considered the "public concern" issue as an element of the *Pickering* balancing test or the *Mt. Healthy* analysis.[15] But *Connick* is clear that the decision whether the employee engaged in protected conduct precedes both of these considerations. *Pickering* applies to determine if the state's response to an employee's protected conduct was justified, given the state's interests.[16] *Mt. Healthy* presumes protected conduct and addresses causation with respect to an alleged governmental response.

For reference, although it is beyond the scope of this chapter, the final portion of the *Connick* opinion includes a review and application of the balancing test by the Court. The Court sets forth a number of factors which can be considered as affecting the state's interest in promoting efficiency, integrity and discipline in its operations. These include the closeness of the working relationship necessary between the employee and his or her superiors and the degree to which the conduct may disrupt that relation; the manner, time and place of the expression as they relate to the regular functioning of the affected operation; and, the context within which the conduct took place.[17]

The closing comments of the Court are an appropriate summation of the principles of constitutional law involved:

> [T]he First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. *For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here.* (emphasis added)[18]

CONCLUSION

In employee claim of violation of the free speech right in employment dismissals or discipline, a three-fold process of review should be made: (1) Was the conduct in question constitutionally protected under *Connick* in that it affected matters of legitimate public concern?

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15. McGill v. Board of Educ. of Pekin Elem. School, 602 F.2d 774 (7th Cir. 1979); Key v. Rutherford, 645 F.2d 880 (10th Cir. 1981).
16. Connick, *supra* note 3 at 722.
17. *Id.* at 722-24.
18. *Id.* at 725.

(2) If so, was the school district's action in response to the conduct justified in *Pickering* in light of the school district's interest in the efficiency, integrity and discipline of its operation? (3) Was the school district's action motivated by the employee's protected conduct or were there other, constitutionally neutral factors that would have caused the action in the absence of the protected conduct, as described in *Mt. Healthy* and *Givhan*?

As can be seen, the *Connick* issue is the threshold question, for in the absence of protected conduct further inquiry is unnecessary. To the practitioner, *Connick* gives a basis for summary dismissal of the meritless claim arising from the attempt to constitutionalize what is merely a private employee dispute.